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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

FREDERIC D. McKENNEY,
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Attorneys for Appellant.

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List of Cases Cited.

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Preliminary Statement.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the claimant below and denying its right to recover the cost of underpinning to bed rock, by means of cylinders of steel and concrete, at a cost of $4,450, the southernmost columns of the east and west walls of the building 25 Pine street, New York City, which underpinning said claimant contended was in addition to the work called for by a contract which it had made with the United States for the construction of the foundation for an extension of the United States Assay Office in said

city, which adjoined the premises underpinned on the south.

By an addendum to the specifications upon which the claimant's proposal was based the United States called for underpinning to rock the main rear walls of the *"building"* joining the north line of the site of the Assay Office foundation. The claimant understood this to mean 27-29 Pine street, which had a heavy masonry wall, and was proceeding to underpin this latter building to rock when it was compelled to also underpin in the same manner the adjacent building, 25 Pine street (which had a light metal curtain wall), upon the ground that two buildings were intended by this addendum, although but one was expressed.

Essential Facts Found by the Court Below.

On or about February 26, 1909, the United States, acting therein through the supervising architect of the Treasury, invited proposals for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office building in the city of New York in accordance with drawings and specifications prepared in the office of said supervising architect. These specifications, under the heading "Excavation," contained the following provision:

> "The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring, underpinning, etc., in connection therewith must be done. The contractor shall furnish complete drawings showing the shoring for floors, etc., in the present front building as completed" (R., 5).

Subsequently, and on or about March 18, 1909, said supervising architect sent to all parties from whom proposals had been solicited the followig addendum, amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architect.'" (R., 5).

On April 2, 1909, after the receipt by it of said addendum, the appellant submitted its proposal to furnish all labor and material required for said work for the sum of $79,400, and on May 22, 1909, the United States, acting therein through J. B. Reynolds, Assistant Secretary of the Treasury, sent the appellant a communication accepting its said proposal in the following language:

"In accordance with Department approval of the 18th instant, your proposal, dated April 2, 1909, the lowest received under advertisement of February 26, 1909, and opened April 3, 1909, in amount seventy-nine thousand and four hundred dollars ($79,400.00), is accepted to furnish all the labor and materials required for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office building, New York, N. Y., in strict accordance with drawings numbered 101 and 102, such other drawings as may be furnished, the specification dated February 26, 1909, and the addendum thereto dated March 18, 1909, and the instructions of the superintendent.

* * * * * * *

"It is understood and agreed that you are required to execute a formal contract, with bond, in the sum of one hundred and twenty-five thousand dollars ($125,000.00), guaranteeing the faithful performance of the work embraced in this acceptance, a form for which will be forwarded you." * * * (R., 5, 6).

Thereafter, and on or about May 24, 1909, the United States, acting therein through said J. B. Reynolds, Acting

Secretary of the Treasury, entered into a contract in writing with the claimant for the performance of said work for said price of $79,400. Said contract is set forth at pages 6 and 7 of the record.

The Assay Office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine, and William streets. The buildings surrounding the site of the excavation for the work were the old Assay Office on the south, the Subtreasury building on the west, the two buildings 25 Pine street and 27 and 29 Pine street on the north, and the Gallatin Bank building on the east.

When the appellant submitted its detailed drawings showing the proposed method of underpinning and protecting the walls of the Pine Street buildings, the supervising architect telegraphed to it, on August 3, 1909, as follows:

> "Referring to blue prints submitted by you showing underpinning buildings Pine street, please state why drawing does not show underpinning twenty-five Pine street extending to rock" (R., 8).

To which the appellant replied on the same day:

> "We are in receipt of your telegram under date of August 3rd, and in reply will say that according to the 'Addendum to the specifications for the foundation of the extension, remodeling, etc., of the United States Assay Office building at New York, N. Y.,' we understand that the 'building' referred to means No. 27-29 Pine street, as No. 25 Pine street has no rear wall; it is simply a light metallic curtain wall which is supported on the side walls. We did not consider that there was any rear wall in this building, therefore we show the side walls to be taken care of in the usual manner and believe our method so provides" (R., 8).

Thereupon much correspondence ensued between the supervising architect and the appellant in reference to the contract requirements and necessity for the underpinning

to rock of the building No. 25 Pine street (R., 8), and on October 20, 1909, appellant was ordered by the supervising architect to proceed with the work of underpinning said building, 25 Pine street, to rock as follows:

> "The receipt is acknowledged of your letter of the 15th instant, and the statements made therein are noted.
>
> "In reply, you are advised that the position of the office in regard to underpinning to rock No. 25 Pine street, in connection with your contract for the foundations of the extension, remodeling, etc., of the Assay Office, New York, N. Y., was fully set forth in its letter to you of the 2d instant, and the office is of the opinion that this work is required by the terms of your contract and that you are not entitled to an extra therefor.
>
> "You are therefore directed to carry out this portion of your contract without further delay, and in accordance with office letter of the 2d instant" (R., 8).

The appellant thereupon, on October 28, 1909, notified the supervising architect that the estimated cost of underpinning to rock the two southernmost columns of the east and west walls of said building, 25 Pine street, would be $4,800, in addition to the price named in said contract, and concluded its said communication with the following statement:

> "As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above" (R., 8).

To which the supervising architect replied on October 30, 1909:

> "Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th and 26th inst., and without expense to the Government, and you are advised that unless you take action along this line within a reasonable time, consideration will be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense" (R., 8, 9).

Upon appeal to the Secretary of the Treasury the action of the supervising architect was ratified and the appellant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the supervising architect, otherwise the contract would be completed at its expense (R., 9). The appellant did the extra work under protest (R., 9), and completed it and all of the work under said contract within the time stipulated in the contract and to the satisfaction of the representatives of the United States, at an actual increased expense, for the underpinning to rock of the building 25 Pine street, of $4,450 (R., 9).

To underpin said premises to rock the appellant was required to sink two cylinders, one under the last column on the east side of the building 25 Pine street, and one under the last column on the west side of said building. To do this it was necessary to remove the earth from under these columns and sink the cylinders to rock in the excavations made for them. In connection with the sinking of the cylinder under the east side of the building a drift or tunnel 10½ feet long, 6 feet wide, and 6 feet high had to be run from the extreme rear of the foundation to a point under the column, and from this drift the cylinder was sunk to rock to a depth of approximately 40 feet. On the west side a drift 5 feet wide, 5 feet deep, and 6 or 7 feet high was made and a similar cylinder sunk to the same depth. Each cylinder or caisson was built of concrete and steel and was 3½ feet in diameter (R., 9).

Prior to the receipt by the appellant of the order of the United States to protect the rear wall of the building No. 25 Pine street by underpinning to rock, appellant had proposed to protect said building by means of horizontal beams projecting through the building and supported on the ground by blocks and posts called rakers and needle beams. This was the method adopted as to the Gallatin Bank building, the foundation of which extended below the depth of the proposed excavation.

The cost of the method of protecting by shoring up with timbers was nominal as compared with the cost of underpinning.

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the office of the supervising architect of the Treasury. Between the date of issuing the specifications and the time of opening the bids the drafting and construction division of the supervising architect's office concluded that it was necessary to underpin to rock the two buildings 27 and 29 Pine street and 25 Pine street, and, in order that the bid and subsequent contract might cover all of the work, that division prepared a memorandum for the addendum to the specifications to be sent to all bidders, which read:

> "Bidders are hereby informed that the specification is to be amended as follows:
>
> "'Page 7, fourth paragraph, under "Excavation," after the clause "and all necessary shoring, underpinning, etc., in connection therewith must be done," add "In the case of the buildings joining north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architects."'"

This memorandum for the addendum was, in due course, sent to the computing division of said office, where the word "buildings" was inadvertently changed to "building" in the addendum to the specifications, which was sent to appellant under date of March 18, 1909.

The building known as 25 Pine street was 10 stories in height above Pine and 11 stories above Wall street.

The main rear wall of the building 27 and 29 Pine street was of brick and masonry, and above the level of the first story was carried on the steel frame of the building. This steel frame is supported by columns which extend down to the basement line and were carried there on a system of built-up steel girders, filled in with concrete, making a broad foundation for the columns.

The main rear wall of the building No. 25 Pine street was of angle iron covered with sheet metal and carried by columns of steel resting on corner columns of the building. The weight above the first floor was transferred to the side walls and columns and from the columns to the foundation.

ARGUMENT AND AUTHORITIES.

Construction of the Contract.

The court below construed the addendum to the specification, calling upon the contractor to underpin to rock the main rear walls of the *building* joining the north line of the site of the excavation, to require it to underpin the main rear walls of *two adjoining buildings*, upon the theory that, prior to submitting its proposal, the contractor had been invited to visit the site and might have ascertained that there were two buildings contiguous thereto on the north, which the supervising architect desired to have underpinned, and that it could not rely upon this precise and unambiguous language of the addendum, nor upon its judgment as an expert contracting engineer that the addendum referred to a single building, 27-29 Pine street, having a heavy masonry rear wall which might crumble and crack, and not to the adjacent building, 25 Pine street, which had a light curtain wall composed of a sheet of metal, which was not likely to be endangered (R., 8).

This decision is directly in conflict with the just and equitable principle, firmly established many years ago by this court, that a contractor cannot be required, without compensation, to double the quantities of work actually specified in an advertisement for proposals prepared by the Government, by recourse to general requirements, calling upon the contractor to visit the site and inform himself of what was needed.

It seems to us that the leading case of the United States *vs.* Stage Company (199 U. S., 414) is decisive of the question here involved. There, this court, in reviewing a contract for carrying the mails, held:

> "The second question involved is as to the right of the contractor to recover because the Government's advertisement for proposals, instead of stating the number of elevated stations to be served at *four,* which was, in fact, the number, gave the number of stations at *two,* thus doubling the number of trips necessary. It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the Government, in its advertisement, had positively stated the number of stations at two. The contractor had a right to presume that the Government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the Government agents and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for Government service, that the general statement that the contractor must investigate for himself, and of non-responsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt" (p. 424).

See also Beach on the Modern Law of Contracts, sec. 716.

As this contract, and the specifications and addendum forming a part thereof, were not drafted by the claimant, but by the representatives of the United States—the officials of the supervising architect's office—and the error in substituting the word "building" for "buildings" was made in that office, the ambiguity, if there is any in the language of the contract, taking it as a whole, must be resolved against the United States.

Beach, *id.*, sec. 726.

Chambers *vs.* U. S., 24 Ct. Cls., 387, and cases there cited.

Otis *vs.* U. S., 20 Ct. Cls., 315; 120 U. S., 115.

Edgar and Thompson Works *vs.* U. S., 34 Ct. Cls., 205.

Gibbons *vs.* U. S., 109 U. S., 200.

Garrison *vs.* U. S., 7 Wall., 688.

> "Words are construed most strongly against the party using them. This rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes that the court will adopt a construction by which they would mean another thing, more to his advantage" (Anson, Law of Contract, p. 328).

In Collins *vs.* United States (34 Ct. Cls., 294) it was held that a contractor who excavates the number of cubic yards required by his contract is entitled to compensation for extra excavation below grade, called for by the engineer in charge, notwithstanding a provision in the contract providing: "The lock pit must be excavated to the width and length and depth which the engineer in charge shall deem necessary."

A specific provision in a contract calling for one injector and one pump controls general provisions of a contract that

everything needed for a highthouse shall be supplied to make it ready for use.

Erickson *vs.* U. S., 107 Fed., 204.
See also Salt Lake City *vs.* Smith, 104 Fed., 457, 466.

Nor should the United States be permitted to escape the consequences of the erroneous omission of its own representatives by shielding itself behind the special provision of the contract, making the decision of the supervising architect as to the quality and quantity of materials furnished *under* the contract final, or the general provision that "the decision of the supervising architect as to the proper interpretation of the drawings and specifications shall be final." These clauses do not and cannot relate to extra labor and material which the specifications failed to embrace and the contract did not cover, and for which the claimant seeks compensation upon a *quantum meruit* (Salt City *vs.* Smith, *supra*). But if they did, and the supervising architect is to be regarded as the sole arbiter, the claimant would not be bound *by his manifest mistake of law* (U. S. *vs.* Farragut, 22 Wall., 406, 420). The construction and interpretation of the language of this contract and these specifications is unquestionably a matter of law, and it will hardly be contended that the words "building" and "buildings" are manifestly the same.

In this case the officials of the supervising architect's office, when they drafted the memorandum for the addendum to the specifications, designedly employed the word *"buildings"* in order to bring forth proposals for the underpinning to rock of the building 25 Pine street as well as the building 27 and 29 Pine street. Through an error in that office for which the contractor was in no way responsible and of which it had no knowledge, the United States invited and obtained from the appellant a bid for the underpinning of only one, instead of both, of these buildings. If the addendum to the specifications had required the under-

pinning of "buildings" instead of "building," the appellant's proposal would have been increased accordingly, and the United States is not, therefore, being called upon to pay for anything beyond what its representatives intended and expected to pay when the memorandum for the addendum was drafted (R., 9-10).

The appellant recognized its obligation under its contract to make the excavation "in such a manner as not to endanger adjoining property"; had given to the United States a bond in the large sum of $125,000 to secure the faithful performance of this and all other provisions of said contract, and was proceeding in the usual way and in accordance with the usual engineering practice to take all precautions necessary for the protection of the adjoining buildings (R., 8). The general obligation of the contract regarding the *protection* of adjoining property by *"necessary shoring"* was entirely distinct from the subsequently added clause of the addendum regarding *underpinning*. As there were two buildings joining the north line of the site, but only one of them (27 and 29 Pine street) had a rear masonry wall (R., 10), the appellant submitted its detailed drawings showing the proposed manner of underpinning the latter building to rock in accordance with the addendum to the specifications and the method by which it proposed to protect and shore up the other building (25 Pine street) by means of heavy beams of timber (R., 8).

After the work of excavation was begun nothing developed to make it necessary to adopt any other than this *means of protection* for the building 25 Pine street, which was the method successfully employed with the consent of the Government representatives for the protection of the Gallatin Bank building, a more massive and heavier structure, immediately adjoining on the east the assay office excavation (R., 8-9).

The expense of the method which the appellant proposed to adopt for the protection of the building 25 Pine street, and did use in protecting the Gallatin Bank building, was

nominal as compared with the cost of forcing steel and cement caissons to bed rock (R., 9).

The United States cannot, therefore, in the independent clause of the contract relating to the *protection* of buildings, which it was not called upon to invoke, find support for its contention based upon another and separate clause relating to *underpinning*.

Finality of the Decision of the Supervising Architect.

The court below reached the conclusion that the determination of the supervising architect as to the meaning of the disputed phrase of the addendum was binding upon the contractor under the general provision of the contract that "the decision of the supervising architect as to the interpretation of the drawings and specifications shall be final" (R., 12).

But the authority of the supervising architect regarding this matter, as well as his power to inspect all materials furnished and work done under the contract and render a final decision as to quality and quantity of such materials, is not supreme and irreviewable, but, as this court has decided time and again, such power must be exercised reasonably and not arbitrarily, and cannot be employed as a shield to protect the supervising architect or other contractual arbiter from such gross mistakes of fact or errors of law as necessarily imply bad faith.

The court below, in Moore's case (46 Ct. of Cls., 139, 172), in construing a contract giving the Government engineer full power of inspection, supervision, and rejection, held that the contractor could not be made to bear the loss arising from defects in the plan for which such engineer and not the contractor was responsible. Applying that well-settled equitable rule to the facts of this case, the appellant should not be compelled to suffer loss by reason of errors in the specification admittedly made by the supervising architect. The appellant agreed to be bound by the supervising architect's

reasonable decisions regarding the quantity and quality of material to be supplied under the contract and the proper interpretations of the drawnigs and specifications—not by his mistakes of both fact and law necessitating expensive additions to the contract work.

See also—

O'Hare's case, 18 Ct. of Cls., 646; 122 U. S., 640.
Roettinger's case, 26 Ct. of Cls., 391.
Axman's case, 47 Ct. of Cls., 537.
Ripley *vs.* The United States, 223 U. S., 695, 701, 702.

If this contract had been for the erection of a *building* and, after the detailed plans were submitted, the officer who prepared the specifications and who had erroneously stipulated one building, insisted that two buildings were intended by him and the contract must be construed to mean two, could such a decision be regarded as a finality under a general clause giving him the right to interpret the drawings and specifications? On the contrary, would not his action in thus attempting to cover up his mistake and obtain two buildings for the price of one savor of bad faith and indicate a refusal to exercise an honest judgment?

Courts strictly construe agreements for compulsory arbitrations (136 U. S., 255) because they deprive the judicial tribunals of their proper jurisdiction, and, as Mr. Justice Lamar held in Ripley *vs.* The United States, *supra*, they will never permit an arbitrator to cover up a gross mistake of fact by making a grosser mistake of law.

When the supervising architect drafted the addendum to the specifications he deemed it necessary to use the plural "*buildings*" in order to obtain the desired proposals from prospective bidders for the underpinning of the two buildings; but when he discovered that through "inadvertence" he had employed the singular "*building*" he insisted that this word was the equivalent of "*buildings*" and compelled the contractor to perform $4,450 worth of additional work,

without compensation, under threat of forfeiture of a contract involving $79,400, and for the performance of which the contractor had given bond in the penalty of $125,000.

The Decision of the Court of Claims Reforms the Contract to Express the Intention and for the Exclusive Benefit of One of the Parties.

The court below found that through "inadvertence" the word *building* instead of *buildings* was used in the addendum and reformed the contract to conform to the unexpressed intention of the Government officers, thereby permitting the party at fault to profit by his own negligence, while denying any relief to the other contracting party.

An equity court may reform a contract for a mutual mistake and place the parties thereto in the position they would have occupied had the mistake not been made, but we know of no authority for the position that a court of chancery may remold a contract to accord with the intentions and understandings of one of the parties at the sole cost of the other party thereto.

This principle is clearly set forth in the leading case of Hearne *vs.* The Marine Insurance Company (20 Wall., 488, 490), where Mr. Justice Swayne says:

> "The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.
>
> "The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be

> mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

Which is quoted with aproval in *Moffett, Hodgkins & Co. vs. Rochester,* 178 U. S., 384.

Although the Court of Claims has announced that it is not engaged in the singular office of "doing right to one party at the expense of a precisely equal wrong to another" (Cramp & Sons *vs.* United States, 46 Ct. of Cls., 536), we respectfully submit that it has done so in this case, and that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment in favor of the appellant for the sum of $4,450.

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No.

In the Supreme Court of the United States

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Merrell-Soule Company, Appellant,

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No. 281.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from a judgment dismissing the petition.

The action arose by reason of a contract with appellant for the extension and remodeling of the assay office building located on Wall Street, New York, N. Y., in accordance with drawings and specifications prepared by the Supervising Architect of the Treasury. The specifications (Finding II, Rec. 4, 5) contained, in substance, the following provisions: That bidders were to inform themselves of the conditions under which the work was to be performed; that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications was to be final; that under the specification covering "Excavation" all necessary

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shoring and underpinning must be done by appellant in such a manner as not to endanger adjoining property.

Approximately two months previous to the signing of the contract the Supervising Architect added the following paragraph to the specifications (Finding III, Rec. 5):

> Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under "Excavation," *after the clause* "and all necessary shoring, underpinning, etc., in connection therewith must be done," add "In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." (Italics ours.)

The buildings surrounding the site of the excavation for the work were the old assay office on Wall Street, to the south, the Subtreasury on Nassau Street to the west, the two buildings, 25 Pine Street and 27–29 Pine Street on the north (27–29 being one building), and the Gallatin Bank Building on William Street to the east. The building designated as 25 Pine Street was ten stories, and 27–29 Pine Street was thirteen stories above the grade of Pine Street. Each of these buildings was one story higher in the rear and at the line of the assay office extension. (Finding VI, Rec. 7.)

When appellant submitted its detail drawings showing the proposed method of underpinning and protecting walls of adjoining buildings, a contro-

versy ensued between the company and the Supervising Architect as to the requirement for underpinning 25 Pine Street to rock. Appellant asserted that because the word "building" appeared in the addendum above quoted, the company was required to underpin one building only, and of its own volition selected the one numbered 27–29 Pine Street. As to the other building, No. 25 Pine Street, appellant contended that ordinary shoring with blocks and posts, known as rakers and needle beams, was sufficient support during the progress of the work.

After much correspondence the Supervising Architect finally notified appellant that the work of underpinning No. 25 Pine Street was required by the terms of the contract, without additional pay therefor, and stated that unless action along this line was taken within a reasonable time, consideration would be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at the company's expense.

Upon ratification by the Secretary of the Treasury of the action of the Supervising Architect, appellant performed the work under written protest and, the court found, at a cost of $4,450.00 for underpinning the building at No. 25 Pine Street. (Finding VI, Rec. 7–9.)

Appellant's position is that as the specifications and addendum to the contract were drafted by the Government representative, and the error in inserting the word "building" instead of *buildings* in the

addendum was made by the Government, the ambiguity, and the cost to appellant resulting therefrom, must be resolved against the United States. (App. brief, p. 10.)

The Government maintains that the specifications under the subject of "Excavation" (Finding II, Rec. 5) required "all necessary shoring and underpinning, etc.," in connection with the excavation to be done by appellant, and "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications" was to be final; that his requirement of underpinning No. 25 Pine Street could not, therefore, be questioned; that the addendum (Finding III, Rec. 5) amending the specification under the heading "Excavation" was to come "after the clause 'and all necessary shoring, underpinning, etc.,'" indicating very clearly that it was not to be in lieu of anything in the general specification, or a limitation upon the general specification requiring shoring and underpinning, but simply an amplification of the excavation specification; that the addendum itself clearly calls for underpinning of all of the main rear walls joining the north line; that the word "building" as explained by the words "rear walls," must be read as *buildings;* that appellant is estopped from asserting a misunderstanding as to the conditions, because it was required to and did make a previous examination and had equal opportunity with the Government of knowing the situation.

First. The Supervising Architect being authorized to require underpinning where necessary, his judgment can not be questioned in the absence of bad faith on his part.

Second. The contract required appellant to make its own investigation, and having responded thereto and obtained full information, it can not be heard to complain.

FIRST.

The Supervising Architect being authorized to require underpinning where necessary, his judgment can not be questioned in the absence of bad faith on his part.

The specifications (Finding II, Rec. 4) state:

> Any items which may not be indicated on the drawings or mentioned herein, but are necessary to complete the entire work, must be supplied in place. The decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final.

Under the heading "Excavation" it is provided:

> Certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included. * * *

> The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, *and all necessary shoring and underpinning, etc., in connection therewith must be done.* (Rec. 5.)

The contract provides (Finding V, Rec. 7):

> It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract, and the decision of said Supervising Architect as to quality and quantity shall be final.

No conduct such as to imply bad faith on the part of the Supervising Architect in requiring the underpinning for the rear wall of No. 25 Pine Street was alleged, proven, or found in this case. In the absence of such a finding his decision that the underpinning was necessary on the said premises is final and should foreclose appellant's contention.

Martinsburg & Potomac R. R. v. *March*, 114 U. S. 549;

Chicago, Santa Fe, etc., R. R. v. *Price*, 138 U. S. 185;

Kihlberg v. *U. S.*, 97 U. S. 398;

United States v. *Gleason*, 175 U. S. 588;

Fruin-Bambrick Const. Co. v. *Ft. Smith & W. R. Co.*, 140 Fed. 465.

Appellant, however, asserts in effect that the addendum amending the paragraph under "Excavation" heretofore quoted repeals the other part of the specifications giving the Supervising Architect the final decision in determining where underpinning is necessary. The addendum is as follows:

> Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under "Excavation," *after the clause* "and all necessary shoring, underpinning, etc., in connection therewith must be done," add: "In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." (Finding III, Rec. 5.)

It is seen that the addendum sets out specifically that on "the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect." Pine Street is the north line of the site and where buildings 25 and 27–29 are located.

Counsel also seem to overlook the effect of the location of the addendum in the specification. The words "*after the clause*" "*and all necessary shoring, underpinning, etc.,*" are the key to the situation. In other words, the phrase "*after the clause*" indicates that the addendum is not to be in lieu of anything appearing in the specification but is an amplification by the way of emphasis and direction to appellant as to the underpinning required for the north line of the site, as the north line was the danger

line. It does not in any way limit the Supervising Architect's authority in declaring where underpinning shall be required. Moreover, the word "building" might well mean Nos. 25 and 27–29 Pine Street, for they are both very narrow buildings and are walled against each other. The court, however, found (Finding IX, Rec. 9) that "the use of the word 'building' in the addendum to the specifications was the result of a clerical error in the Office of the Supervising Architect of the Treasury."

In attempting to wrench the word "building" from the addendum and to interpret it apart from the rest of the contract, appellant calls to its support the case of United States v. Stage Company (199 U. S. 414). There the Government, in advertising for proposals for the delivery of mails at certain points in New York City, represented that there were *two* stations on an elevated street railway to be supplied. The statement of the number of stations was unequivocal. The advertisement was prepared by the Government for the guidance of bidders. It contained a general statement that the contractor must investigate for himself. It developed that there were four stations instead of two, thus requiring double service. Appellant did not make any investigation, but relied on the representations contained in the advertisement.

The language was definite. *Two* stations were to be served; no more, no less. There was no room for doubt. There was nothing to suggest to the bidder that investigation should be made to ascertain

the number of stations and the situation was peculiarly within the knowledge of the Government agents. The court held that under the circumstances the representation as to the number of stations was in the nature of a warranty; that the bidder was not bound to make an investigation, and the Government was liable for additional compensation.

In the case at bar there was the general clause giving the Supervising Architect the final decision as to where underpinning should be placed. It was general and not limited. The addendum specifically says "rear walls," which, as a descriptive term, would certainly indicate the wall of No. 25, as well as 27–29 Pine Street. The words "rear walls" being plural must apply to the walls of the two buildings on the north side. This is further borne out by the finding that the word "building" was a clerical error.

Appellant is estopped from asserting that the word "building" should be read apart from the rest of the context to mean only one building. If it did mean one building, upon what theory could appellant assert the right to underpin 27–29 and not 25 Pine Street? What authority did the company have to make the selection? The absurdity of appellant's position is apparent.

This court has held that though a word in a contract when standing alone may denote the singular, but when read with the rest of the contract the plural is indicated it shall be so construed.

In the case of *O'Brien* v. *Miller* (168 U. S. 287) the word "vessel" in a bond was construed to mean

vessels. There an American ship, the *Johnson*, voyaging to Hamburg, sprung a leak and put in at Colloa. Part of the cargo was transferred to the *Leslie*, a British bark, and the *Johnson* was repaired. A bottomry bond to meet the expenses of the repairs was executed on the *Johnson* and its cargo, and the portion of the cargo transferred to the *Leslie* providing that if the said vessel was lost by the perils of sea, etc., then the obligation was to become void. Both vessels sailed. The *Johnson* was sunk. The *Leslie* reached its destination in safety. The consignees of the cargo on the *Leslie* being required to pay the whole amount of the bond, brought suit to recover from the owners of the *Johnson* their share of the sum paid on the bottomry bond.

Mr. Justice White said:

> The libellants assert that from the terms of the bond as a whole it manifestly results that the cargo of the *Leslie* was liable despite the loss of the *Johnson* and her cargo; that hence the consignees of the cargo on the *Leslie* were obliged to pay the bond, and that on their doing so there arose a legal duty on the owner of the *Johnson* to pay the proper proportion thereof, which obligation, it is claimed, can be enforced despite the loss of the ship, since the owner had recovered and retained the amount awarded against the *Thirlmere*.
>
> On the other hand, the respondent asserts that the words of the bond providing for its avoidance in case of the loss of "said vessel" are free from ambiguity and give no room for construction. * * *

In passing upon the question of the meaning of the contract (pp. 296–297), the court said:

> There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that "if during said voyage an utter loss of the 'said vessel' by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void." But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the

> whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them.

And on page 299, the court used this language:

> Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word "vessel" in the defeasance clause as not applying to both the *Johnson* and the *Leslie*.

Again viewing the contract in the case at bar in the light of the geographical situation, it is apparent that the Supervising Architect did not exceed his authority in requiring the underpinning of both buildings on the north line of the site.

Between the foundation line of the assay office extension and the center of the nearest column of the building at 25 Pine Street there was only 5½ feet of space; while 27–29 Pine Street was 9½ feet distant from the foundation line of the assay office extension building. This would indicate even a greater necessity for underpinning 25 Pine Street. Moreover the subsoil 2 to 3 feet below the surface to within a few feet of bedrock, 50 feet below, was quicksand, a most precarious situation upon which to rest the exposed foundations of a building ten stories high.

Appellant argues that because the Gallatin Bank Building was shored with blocks and posts only that the same might have been done at 25 Pine Street.

The fallacy of this contention is apparent in view of the fact that 25 and 27–29 Pine Street were exposed for 15 feet below the bottom of their foundations, while the Gallatin Bank Building extended below the proposed excavation of the assay office building. It had supports unexposed and it was not necessary to underpin it.

Counsel would have us draw the inference that because 25 Pine Street was backed with a "curtain wall" of angle iron covered with sheet metal, it would not require underpinning as would 27–29 Pine Street, because the latter was of brick. The fact is (Rec. 10) that both the walls of 25 and 27–29 were curtain walls, and, while the brick and masonry thereof might have been a little heavier, the pressure exerted on the foundation of 25 Pine Street by the 10 stories above was so great that the Supervising Architect was certainly within his powers in requiring an underpinning thereof, in view of the fact that the entire rear foundation was exposed and was resting upon quicksand.

SECOND.

THE CONTRACT REQUIRED APPELLANT TO MAKE ITS OWN INVESTIGATION, AND HAVING RESPONDED THERETO AND OBTAINED FULL INFORMATION, IT CAN NOT BE HEARD TO COMPLAIN.

The bidders were required to visit the locality and fully inform themselves. Under the heading "Extent of work" (Finding II, Rec. 4) it was required that—

> The bidders should visit the site and fully inform themselves of the character of the

> same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government.

Responding to this specification a thorough examination was made. In Finding IX (Rec. 10) it says:

> Before submitting a proposal for the work the claimant, through its president and agents, made an investigation of the site of the work and the buildings surrounding said site, and ascertained that the rear of both the buildings, Nos. 25 and 27 and 29 Pine Street, were close to said site on the north.

Judge Atkinson, in his opinion (p. 12, Rec.), says:

> The claimant's president visited the site of the proposed work, as did also his engineer. The surrounding conditions were known to them. They knew that there were two buildings, the rear of which adjoined the site. One of these, 27 and 29 Pine Street, was built up of brick or masonry from the top of a one-story extension, while the other from the top of the first-story extension was constructed of metallic sheets supported on the framework of the building. The weight at the rear of the building, No. 25 Pine Street, was carried on pillars at either end of the side walls, and the south ends of these walls were several feet nearer the proposed excavation than was the rear wall of the other building.

If it were necessary to show any further knowledge on the part of appellant, the testimony of Mr. Merrill, president of the company (which testimony is not and can not be contradicted), upon which the aforesaid finding and opinion rest, would certainly estop appellant from any claim of lack of knowledge. An excerpt from his testimony is as follows:

> 130. xq. What investigation, if any, did you make of the foundations of these various structures surrounding this assay office before submitting a proposal for the work under this contract?
>
> A. I looked personally at the site of the work and had our engineers make a sketch of the conditions pertaining at the time.
>
> 131. xq. Did that sketch relate to surface indications?
>
> A. I don't quite understand that.
>
> 132. xq. Were these engineers investigating the underlying conditions of the foundations of the adjoining buildings?
>
> A. Yes; and my general knowledge of the soil in New York and the vicinity told me exactly what was underneath the building.
>
> 133. xq. Independent of your general knowledge, what investigations did your engineers make of that subject?
>
> A. They obtained information from the departments by going to the building department in New York and looking up the records in regard to the construction of these old buildings, to see the nature of them and how they were put together.

While the foregoing testimony is not in the record, the Government believes that it is explanatory of

findings based on this testimony, and for this reason, since it is the uncontradicted testimony of a member of appellant company, has taken the liberty of submitting the same for the court's consideration.

In view of this examination and of the knowledge derived therefrom it must be apparent that appellant had equal opportunity for investigation and information with the Government. Having availed itself of the information it can not now call to its support the doctrine laid down in the Stage Company case where no investigation was made and where the court said that the stage company had the right to rely upon the unequivocal declaration in the proposals that there were only two stations to be served. This case does, however, come within the rule laid down in *Farnsworth* v. *Duffner* (142 U. S. 43). There the court held (pp. 47–48) that where the complaining party does not rely upon the representations made by the other party, but seeks from other quarters means of verification of the statements made and acts upon information thus obtained, he can not be heard to say that he was misled by the representations of the other party.

CONCLUSION.

The text of the contract so unequivocally empowered the Supervising Architect to require the underpinning of the said premises that it is respectfuly submitted that the decision of the Court of Claims should be sustained.

HUSTON THOMPSON,
Assistant Attorney General.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

MERRILL-RUCKGABER COMPANY, APPELLANT,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Attorneys for Appellant.

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REPLY BRIEF FOR APPELLANT.

Beginning our reply where the brief of the learned Assistant Attorney General concludes, if, as he asserts, "the text of the contract so unequivocally empowered the Supervising Architect to require the underpinning" of *two* buildings instead of *one,* why was that officer so industriously precise in his draft of the addendum to the specifications to use the plural *"buildings"* to express his meaning?

And when he found that he had erred and in consequence of his error had received from an unsuspecting contractor a bid for the underpinning of one building instead of two,

would not good faith and fair dealing have called for a frank admission of his error and the reopening of the matter upon which the minds of the parties had never met, instead of a shifting of his previous position to enable him to obtain the benefit of the additional work, the cost of which amounted to 50 per cent of the usual estimated contractor's profit of 10 per cent derivable from the whole contract?

The learned counsel for the Government says that the court below made no finding that the Supervising Architect *was guilty* of bad faith. It is equally true that the court below made no specific finding that *he was not guilty* of bad faith. The court, however, found facts which speak for themselves and, we submit, lead to but one conclusion. The Supervising Architect, after making a costly error, sought to cover his mistake by suppressing the fact that he had made it until after appellant's testimony had brought it to light long after the suit had been instituted, by seeking to convey the impression in his correspondence with the contractor (R., 8) that the addendum to the specifications correctly expressed his meaning and that the word building meant the two buildings joining the north line of the site, by shielding himself behind other and general provisions of the specifications, and finally by exerting his arbitral power to force the contractor to comply with his demands. We submit that it requires no formal finding of fact to enable the court to determine whether or not such conduct was consistent with good faith, fair dealing, and an honest endeavor to interpret the contract and specifications.

The learned Assistant Attorney General argues that the case of the *United States vs. Stage Company* (199 U. S., 414) has no application and that the case at bar is to be controlled by the case of *O'Brien vs. Miller* (168 U. S., 287).

That was a suit in admiralty where this court was called upon to construe a bottomry bond given by the master of a vessel upon said vessel and her whole cargo (some of which had been transhipped in another vessel) to secure payment

for certain repairs made on the original vessel, for which the cargo under the admiralty law was subject to hypothecation. The original vessel having been lost and insurance and damages having been collected by her owners, upon a suit brought by the owners of the cargo to recover the cargo's proportionate share of the sum paid to the owners of the lost vessel, it was held that, as the liability for the loss of the vessel attached to the cargo as a whole, any amount recovered must likewise be apportioned among the owners of the cargo as well as the owners of the vessels containing it; that both vessels were mentioned by name in the recitals of the bond and both were undoubtedly contemplated by the contemporaneous construction of the parties, and therefore the word "vessel" in the defeasance clause of the bond should be construed to include both vessels (Op., pp. 298, 299).

The distinction between the O'Brien case and the one at bar is clearly shown in the following paragraph from the opinion of the court:

> "The cargo on the *Leslie* having been hypothecated along with that on the *Johnson*, and the bond declaring that it was upon the faith of such hypothecation that the money was advanced, the claim that because of the use of the word 'vessel' in the singular, the bond was to be avoided by the loss of the *Johnson*, despite the arrival of the *Leslie*, amounts to contending that although both parties declared that the money was lent on the faith of both cargoes, and that without the pledge of both it would not have been advanced, yet that they immediately stipulated that it should be secured upon only one of the objects hypothecated.
>
> "Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word 'vessel' in the defeasance clause as not applying to both the *Johnson* and the *Leslie*" (p. 299).

In the O'Brien case this court was not only dealing with an unusual state of facts entirely dissimilar to those pre-

sented in this case, but with a favored contract of admiralty (Op., pp. 298, 301). The decision shows the uniform tendency of courts exercising equity and admiralty jurisdiction to treat the parties to all contracts with equal fairness. There the court held that the words of a contract should be construed so as to enable those who had shared in the obligations of a bond to also share in its benefits. Here the appellee, while admitting its mistake, seeks a construction of a contract which will give it all the benefit of that mistake and will cast all of the burden upon the other contracting party.

Although *O'Brien vs. Miller* was considered and cited many years later by this court in its decision in the leading case of the *United States vs. The Stage Co.* (199 U. S., 414), upon which appellant relies, it was not found to conflict with the ruling in the latter case that in a contract for carrying the mails upon an elevated railway "two stations" could not be stretched to include "four stations."

Counsel also contends that the case at bar does not fall within the rule laid down in the Stage Company case, but does fall within the rule stated in the case of *Farnsworth vs. Duffner* (142 U. S., 43). *Farnsworth vs. Duffner,* as the court points out in the opening paragraph of its opinion, was "a suit for the *rescission* of a contract of purchase and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendor. In respect to such an action it has been laid down by many authorities that where the means of knowledge respecting the matters falsely represented are equally open to the purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained."

As we have shown, the present case is not a suit for the *rescission* of a contract, but one requiring its construction, according to the contention of the appellant, and its reformation for a mistake in language according to the theory of the appellee. It will take a wide reach of the imagination to

find any similarity between the facts and principles of the Farnsworth case and the one at bar.

The learned Assistant Attorney General seeks to amplify the findings of fact not only by references to the opinion of the court below, but also by setting forth in his brief (p. 15) certain testimony which is not recited in but forms the basis of the court's ultimate findings.

This court, in the case of *Crocker vs. United States* (240 U. S., 74, 78), has recently said:

> "In the briefs reference is made to portions of the opinion delivered in the Court of Claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in *Stone vs. United States*, 164 U. S., 380, 382, 383, that 'the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury,' and that 'we are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings.' See also *Collier vs. United States*, 173 U. S., 79, 80; *United States vs. New York Indians*, 173 U. S., 464, 470."

With every desire to respect and abide by this ruling, but in order to prevent this court from being misled by matter imported into the record through the medium of the Government's brief and by the statement in the concluding paragraph of the opinion of the Court of Claims, "that the intention from the beginning was to require the underpinning of both buildings" (R., 13), we invite the court's attention to the following important evidence in the record below, which the Court of Claims refused to incorporate in its findings (Court of Claims Record, p. 9):

"MERRILL-RUCKGABER CO.

"NEW YORK, August 21st, '09.

"'*Re* U. S. Assay Office Foundation.'

"THE SUPERVISING ARCHITECT,
"*Treasury Department, Washington, D. C.*

"DEAR SIR: In connection with the underpinning of 25 Pine street to rock, wish to say that we have given this subject further careful consideration, and have come to the conclusion that in view of the fact that we do not contemplate any such work in our bid price, we feel, as indicated by our telegrams on the subject, that we should receive an extra payment if the Government requires us to underpin to rock on this building.

"Yours truly,
(Signed) "MERRILL-RUCKGABER CO.
"OGDEN MERRILL, *President.*

"O. M./M."

This shows that the appellant submitted a bid for the underpinning of one building only. The fact that the officers of the Government expected to pay for the underpinning of two buildings was established by the following evidence of Mr. Edward C. Heald, structural engineer of the Supervising Architect's office, who drafted the memorandum for the addendum to the specifications (Court of Claims Record, pp. 94, 95):

"19. Question. I will ask you to state whether or not, in drafting this note for the addendum to the specifications, you regarded the plural term 'buildings' as necessary, in order to cover these two buildings, 25 Pine street and 27 and 29 Pine street, and require their underpinning to rock?

"Answer. I did regard it necessary.

* * * * * * *

"23. Question. And in drafting your memorandum requiring buildings 25 Pine and 27 and 29 Pine

street to be underpinned to rock you expected that the Government, under the contract, would have to pay for this expensive underpinning of both buildings, did you not?

"Answer. Yes."

Respectfully submitted,

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Attorneys for Appellant.

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